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No. 222

In the Supreme Court of the United States

October Term, 1943.

SENECA COAL AND COKE COMPANY, *Petitioner,*

vs.

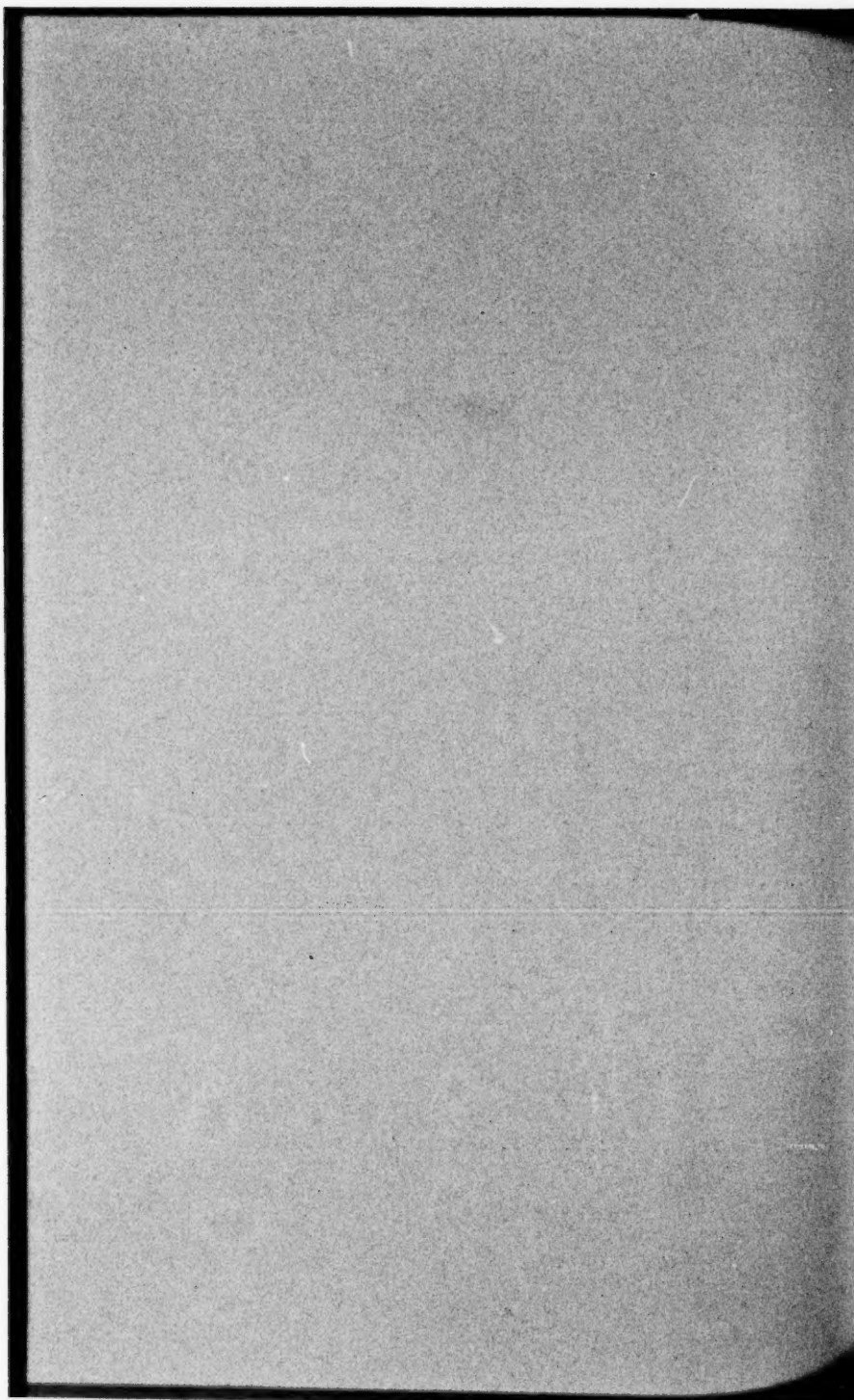
MILO LOFTON, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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KARL H. MUELLER,

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Proposition I. When there are present in an express employment contract and the facts and circumstances incident thereto the necessary elements from which unexpressed contractual elements may be implied under the law of contracts in order to make the contract lawful, operative, definite, reasonable and capable of being carried into effect, without violating the intention of the parties, the Fair Labor Standards Act does not prevent or preclude but permits and requires such implication and construction, and in such cases the formula approved and adopted by the Court below is inapplicable and artificial when it violates the intention of the parties and destroys the expressed terms of the contract. 13

Proposition II. Under the facts found in this case, the Fair Labor Standards Act permits and requires to be supplied by implication or construction, the contractual elements found by the Court not to have been expressed in the express employment contract, in accordance with the law of contracts and particularly the provisions of Sections 15-159 and 15-172, Oklahoma Statutes 1941; and, in view of the definiteness and invariableness of the agreed compensation and the agreed work hours, and the intent of the parties that the salary compensate respondent in full for all hours worked, without violating the law, and with intent to conform to the Fair Labor Standards Act if subject thereto, and the mutual

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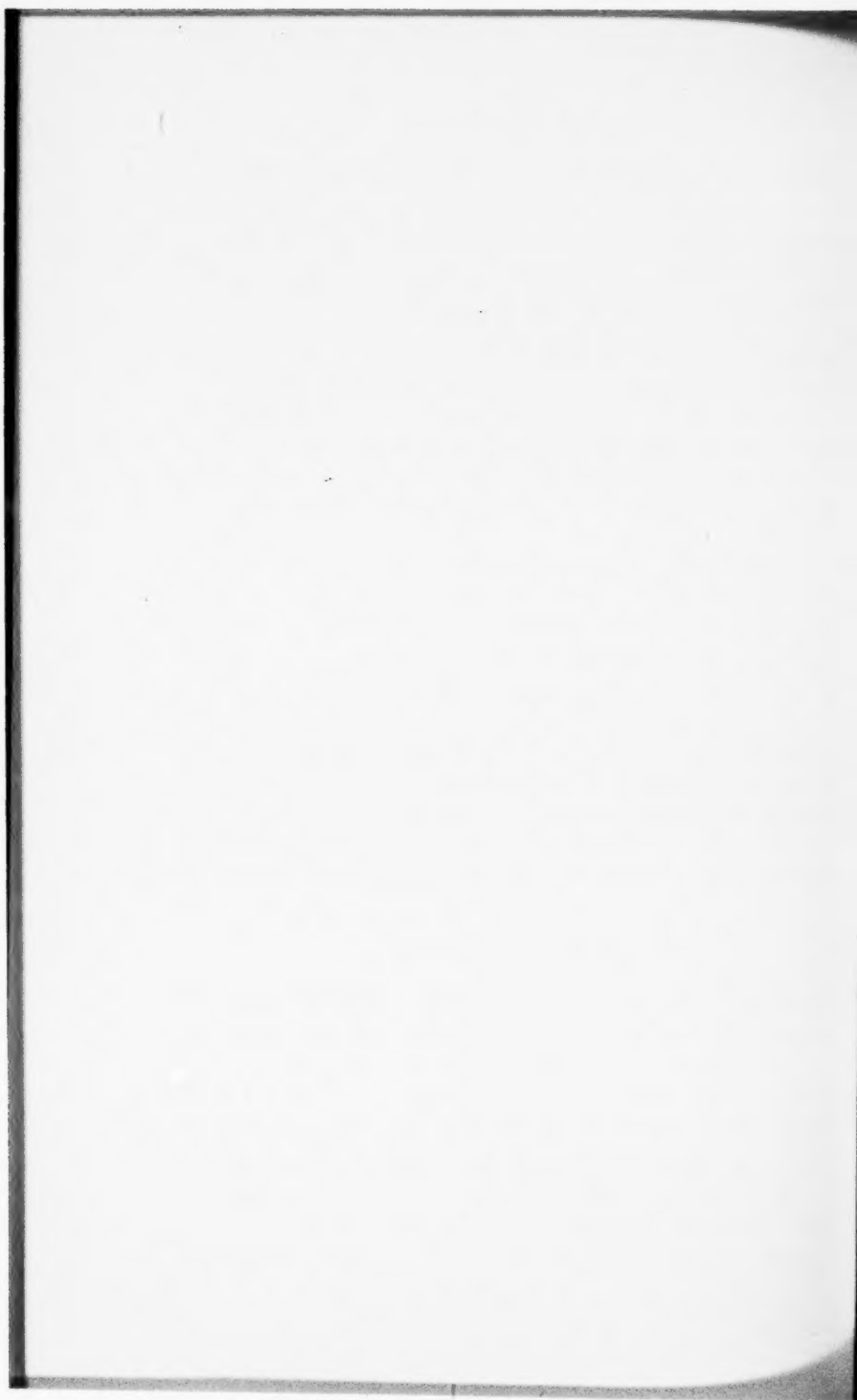
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satisfaction of the parties with such arrangement for nearly two years, it is permissible, and not fictitious, to presume that the parties intended the only thing that would accomplish all such intent, namely, that the statutory maximum straight time weekly work hours are the applicable straight time weekly work hours, under which presumption the intended full compensation and legality result mathematically.	19
<i>Proposition III.</i> The Fair Labor Standards Act is not necessarily violated, so as to give mandatory immediate rise to liability for liquidated damages in an additional amount equal to the overtime compensation earned during a pay period, by failure of the employer on or before the regular pay day, or at any particular time, to pay overtime compensation earned during a pay period; and under the facts found by the lower courts, was not violated in this case with respect to the overtime compensation paid.	25
<i>Proposition IV.</i> Liquidated damages under the Fair Labor Standards Act, while not a penalty, being in the nature of a penalty, as designed to compel or inhibit action, were not enforceable during the effectiveness and on account of the stare decisis effect of, and against one relying on, the decision of this Court in the case of <i>Carter v. Carter Coal Company</i> , 298 U. S. 238, which construed the commerce clause of the Constitution of the United States and the federal powers thereunder, and the general welfare powers of the Federal Government and its Congress under the Constitution, and held that under the Constitution the Federal Government and its Congress are without power to regulate the bituminous coal industry, or wages and hours in that industry.	32
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IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1943.

No. _____

SENECA COAL AND COKE COMPANY, *Petitioner,*

vs.

MILO LOFTON, *Respondent.*

PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED
STATES CIRCUIT COURT OF APPEALS
FOR THE TENTH CIRCUIT.

To the Honorable The Supreme Court of the United States:

The petition of The Seneca Coal & Coke Company, a corporation, designated in said cause below as Seneca Coal and Coke Company, a corporation, respectfully shows to this Honorable Court:

1. That the case is an action at law brought by the respondent, as plaintiff, against petitioner, as defendant, in the District Court of the United States for the Northern District of Oklahoma, for the recovery of overtime compensation under the provisions of the Fair Labor Standards Act of 1938, and for liquidated damages and attorney fees. The trial was by the court without a jury, and the judgment was for the respondent.

2. Petitioner, as appellant, prosecuted an appeal from such judgment to the Circuit Court of Appeals for the Tenth Circuit, which affirmed the judgment of the lower court by its own judgment entered May 29, 1943 (R. 87). On June 28, 1943, petitioner filed and presented its petition for rehearing, which was denied by the Circuit Court of Appeals on July 8, 1943 (R. 92).

3. The appeal involved construction of Section 7(a) and Section 16(b), of the Fair Labor Standards Act of 1938, 29 U. S. C. A. 201, *et seq.*, the court holding and deciding:

(a) That the Fair Labor Standards Act does not permit to be supplied by implication or construction omission of any employment contract to provide expressly a "regular rate" of wage for straight time hours, and division of the agreed work time and agreed salaried compensation into straight time and overtime, and separate compensation for straight time and overtime, respectively, but in all such cases requires the regular rate to be determined by dividing the total weekly compensation by the total weekly hours worked, and to be applied to the maximum lawful straight time hours, with one and one-half times such rate applied to all hours in excess thereof.

(b) That the Fair Labor Standards Act does not permit to be supplied by implication or construction such an omission in an express employment contract, which the court found to have provided expressly a fixed and definite salary for a fixed and invariable number of weekly work hours (which includes statutory straight time and overtime hours), in the making and performance of which by employer and employee the court found that (1) both parties intended such agreed salary to be compensation in full for all such agreed work hours, (2) neither of the parties intended to violate the law, and (3) both of the parties, though believing that the employment was not subject to the Fair Labor Standards Act, in good faith believed that if subject to the Act, the contract, employment and pay-

ments complied with the Act, and so considered and treated the matter for nearly two years; and in effect that, under such circumstances, a method or formula is fictional and inapplicable, which is based upon the presumption or implication that the parties in their contract intended as straight time weekly work hours the only number which would be lawful in the absence of an expressly agreed smaller number of such hours, namely, the maximum statutory straight time weekly work hours; and that the regular rate must be determined by dividing the total weekly compensation by the total weekly hours worked, that such regular rate must be applied to such maximum statutory straight time weekly work hours, as the applicable number of straight time weekly work hours, and that one and one-half times such regular rate must be applied to all hours in excess thereof.

(c) That the Fair Labor Standards Act is violated, so as to give mandatory immediate rise to liability for liquidated damages in an additional amount equal to the overtime compensation, by failure of the employer to pay overtime compensation in regular course of employment (presumably, or or before the regular pay day, a semi-monthly pay day in this case), and that the statute permits no excuse or relief from either the accrual or enforcement of such liability.

4. The appeal also involved the *stare decisis* effect of decisions of this court, particularly the decision in the case of *Carter v. Carter Coal Company*, 298 U. S. 238, construing the commerce clause of the Constitution of the United States, and the federal powers thereunder, and the general welfare powers of the federal government and its Congress under the Constitution, and holding that under the Constitution the Congress is without power to regulate the bituminous coal industry, here involved, or wages and hours in that industry, the Circuit Court of Appeals holding and deciding: that such decision of this court not having decided the constitutionality of the Fair Labor Standards Act, which had not

been enacted at the time, such decision by this court does not have *stare decisis* effect upon the statutory liability under that Act for liquidated damages in an amount equal to overtime compensation.

5. A certified copy and transcript of the record of said case in the Circuit Court of Appeals for the Tenth Circuit is hereby furnished and accompanies this application and petition as an exhibit hereto.

Summary Statement of the Issues and Facts Involved.

Neither party took the evidence to the Circuit Court of Appeals. Both parties have relied upon, and neither controverted for the purposes of such appeal, the facts as found by the trial court. Thus the following facts are not in dispute:

1. Petitioner operated what is known as a strip coal mine located in Oklahoma, in a strip coal mine coal being removed by surface operations of power shovel. Respondent was employed by petitioner as night watchman at said mine. The employment commenced prior to the taking effect of the Fair Labor Standards Act on October 24, 1938, and continued until January 8, 1941.

2. The court found that the contract of employment was an expressed oral agreement that petitioner employed respondent to work as night watchman, fourteen hours per day for six days per week from October 24, 1938, to April 30, 1940, and twelve hours per day for six days per week thereafter until January 8, 1941, at a salary of \$150 per month, plus 80c per day worked, as monthly salary (Finding 12, R. 68); that such salary was mathematically susceptible of being calculated or assimilated into, and was exactly sufficient to pay one definite hourly wage rate for the statutory maximum straight time weekly work hours as regular hours, for each of the periods of said employment, to-

gether with $1\frac{1}{2}$ times such hourly wage rate for all hours worked each week in excess of the statutory maximum hours during such period (and only one such hourly wage rate for each such period, one and one-half times which will mathematically equal the overtime worked), such mathematically calculable rate for each period being expressly found (Finding 16, R. 68-69) and being in excess of the statutory minimum wage; the court further finding that if the said employment contract had expressly provided for such division and application of the monthly salary, the employment agreement, and the payments thereunder, would have been in compliance with the minimum wage, maximum hours and overtime provisions of the Fair Labor Standard Act, and that respondent would have received exactly the same compensation he did receive (Finding 16, R. 69), which was exactly the agreed compensation.

The employment contract, as expressed and as interpreted by the acts of the parties, did not require respondent to work, and he did not work, for the agreed salary, in excess of the agreed hours or days (Finding 14, R. 68).

The court found that in making and performing the said employment contract neither respondent nor petitioner intended to violate the law (Finding 15, R. 68), and intended that said monthly salary compensate respondent in full for all hours worked by him to the extent of the agreed hours per day (Finding 13, R. 68); and that both parties in good faith believed that the employment was not subject to the Fair Labor Standards Act, but that both believed in good faith that if subject to the act, the contract, employment and payments complied with the act, and that no question arose between them for more than two years (Finding 25, R. 72-73), and until after petitioner, in view of uncertainty in court decisions, voluntarily and without suggestion or demand by respondent, computed in manner held by

the lower court to have been proper, and paid to respondent a total sum of \$978.39 (concluded December 27, 1940) as applicable to his overtime compensation if not already legally paid (Findings 18 and 19, R. 69-70), which the court found paid respondent's statutory overtime compensation in full, except \$19.89 representing overtime for half-hour lunch periods, which the court held were erroneously deducted by petitioner in making such settlements (Findings 19, 20, 21 and 23, R. 70 and 72).

The lower court concluded as matters of law, that the Fair Labor Standards Act does not permit to be supplied by implication an omission of an express employment contract to provide expressly for division of agreed work time and agreed salaried compensation into straight time and overtime, and separate compensation for straight time and overtime, respectively (Conclusion 3, R. 73); that under the contract respondent worked in excess of the statutory maximum number of hours permitted to be worked without overtime compensation, so as to become entitled to overtime compensation for the excess number of work hours (Conclusion 4, R. 74); that, in applying the wage and hour provisions of the Fair Labor Standards Act, the agreed monthly salary should be mathematically translated into a regular hourly rate of pay by multiplying by 12 the \$150.00 part of said salary and by 313 (365 days less 52 Sundays) the 80c per day part of such salary, adding together the results to obtain the annual salary, dividing such annual salary by 52 to obtain a weekly salary of \$39.43, dividing such assimilated weekly salary by the total number of hours worked each week to obtain a regular hourly rate of pay for the statutory maximum regular weekly work hours during such week, and multiplying such regular rate by $1\frac{1}{2}$ to obtain the overtime rate for such excess hours (Conclusion 5, R. 74); and the court accordingly concluded as a matter of law that respondent was entitled to, and was paid, overtime

compensation in the total amount of \$978.39 (exclusive of \$19.89 for overtime compensation for the half-hour lunch periods), and then concluded that respondent was entitled to an additional amount equal to said sum of \$978.39 as liquidated damages, which the court found had not been paid (Findings 23, 24, 25 and 26, R. 72-73).

The court found (Finding 25, R. 72) that the delay in payment of the said \$978.39, paid by petitioner to respondent as payment of overtime compensation, was due to the belief of both parties in good faith that the employment of respondent was not subject to the Fair Labor Standards Act, and their belief in good faith that if it was subject to the Act, the contract, employment and payments complied with the Act; that during the time of such delay both questions were the subject of great confusion of opinion among the citizenship, the bar and the courts of the nation; and that the payments of the said sum of \$978.39, as overtime compensation, were made by petitioner voluntarily, and at its own suggestion, as the interpretation of the Act by courts became more clear, and without suggestion or demand by respondent, and before suit, all in good faith on the part of both parties, and without intent of either of them to violate the law; and that (Finding No. 7, R. 65-66) petitioner relied upon legal counsel and the decision of the Supreme Court in the case of *Carter v. Carter Coal Company* in good faith, and without intent to violate the law.

The trial court rendered judgment in accordance with its said findings and conclusions. The judgment was affirmed by the Circuit Court of Appeals, which accepted the findings of the trial court as setting forth the facts.

Reasons Relied on for the Allowance of *Certiorari*.

The case was decided by the Circuit Court of Appeals contrary to the argument and contention of the petitioner, to the converse of the above stated holdings of that court, particularly as follows:

1. That when there are present in an express employment contract and the facts and circumstances incident thereto the necessary elements from which unexpressed contractual elements may be implied under the law of contracts in order to make the contract lawful, operative, definite, reasonable and capable of being carried into effect, without violating the intention of the parties, the Fair Labor Standards Act does not prevent or preclude but permits and requires such implication and construction, and that in such cases the formula approved and adopted by the court below is inapplicable and artificial when it violates the intention of the parties and destroys the expressed terms of the contract.

2. That under the facts found in this case, the Fair Labor Standards Act permits and requires to be supplied by implication or construction, the contractual elements found by the court not to have been expressed in the express employment contract, in accordance with the law of contracts and particularly the provisions of Sections 15-159 and 15-172, Oklahoma Statutes 1941; and that, in view of the definiteness and invariableness of the agreed compensation and the agreed work hours, and the intent of the parties that the salary compensate respondent in full for all hours worked, without violating the law, and with intent to conform to the Fair Labor Standards Act if subject thereto, and the mutual satisfaction of the parties with such arrangement for nearly two years, it is permissible, and not fictitious, to presume that the parties intended the only thing that would accomplish all such intent, namely, that

the statutory maximum straight time weekly work hours are the applicable straight time weekly work hours, under which presumption the intended full compensation and legality result mathematically.

3. That the Fair Labor Standards Act is not necessarily violated, so as to give mandatory immediate rise to liability for liquidated damages, by failure of the employer on or before the regular pay day to pay overtime compensation earned during the pay period; that time for legal performance of the obligation to pay overtime compensation under the Fair Labor Standards Act, not being expressly fixed by the Act, in the absence of contract fixing a time that is reasonable, is a reasonable time, which may be deferred or extended by the parties in the absence of bad faith amounting to intent, express or implied, thereby to violate the Act, and reasonableness of time must be determined by the circumstances of the particular case; and if the payment thereof, whenever due in the original regular course of employment, is delayed due to the belief of both parties in good faith that such payment is not required or has been made, and the employer discovers the error and makes such payment without suggestion or demand by the employee, the statute has been satisfied and no liability arises for liquidated damages by reason of such delay; and that the liquidated damages do not arise until their statutory component measure and purpose at least substantially come into being.

4. That the liquidated damages under the Fair Labor Standards Act, while not a penalty, being in the nature of a penalty, as designed to compel or inhibit action, were not enforceable during the effectiveness and on account of the *stare decisis* effect of, and against one relying on, the decision of this Court in the case of *Carter v. Carter Coal Company*, 298 U. S. 238, which construed the commerce clause of the Constitution of the United States and the federal

powers thereunder, and the general welfare powers of the federal government and its Congress under the Constitution, and held that under the Constitution the federal government and its Congress are without power to regulate the bituminous coal industry, or wages and hours in that industry.

5. The holding and decision of the Circuit Court of Appeals therefore presents important questions of federal law, which have not been, but should be, settled by this Court, and decided federal questions in a way probably in conflict with applicable decisions of this Court.

Wherefore, your petitioner respectfully prays that a writ of *certiorari* be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Tenth Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 2642, *Seneca Coal and Coke Company, a corporation, appellant, v. Milo Lofton, appellee*, and that the said cause and judgment of the said Circuit Court of Appeals for the Tenth Circuit may be reviewed and determined by this Honorable Court as provided by law, or that your petitioner may have such other and further relief or remedy in the premises as this Court may deem appropriate, and that the said judgment of the Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this Honorable Court; and your petitioner will ever pray.

THE SENECA COAL & COKE COMPANY,
Petitioner,

By HUNTER L. JOHNSON,

Of Counsel:

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KARL H. MUELLER.

